



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Sheffield Measurement Division--Request for
Reconsideration

File:

B-224618.2

Date:

September 23, 1986

DIGEST

1. Protest filed with GAO more than 10 working days after the contracting agency denied the firm's agency-level protest is untimely and will not be considered. Protester's continued pursuit of matter with the contracting agency before filing with GAO does not alter this result.

2. No useful purpose would be served by GAO's consideration of whether the protester's bid is nonresponsive, as asserted by the agency, where the propriety of the award made to another firm is not being considered because it was not timely protested to GAO.

3. Protest that invitation for bids is unduly restrictive of competition because specifications allegedly were "written around a competitor's machine" is untimely where not filed prior to bid opening.

DECISION

Sheffield Measurement Division of the Warner & Swasey Company requests that we reconsider our September 5, 1986, dismissal, as untimely, of its protest of the award of a contract by the Anniston Army Depot to Modern Machinery Associates, Inc. under invitation for bids (IFB) No. DAAC01-86-B-0144.

We affirm our dismissal of Sheffield's protest.

Documents attached to Sheffield's protest to our Office show that IFB -0144 was for the supply of a coordinate measuring machine, the specifications for which were in the form of a purchase description containing a list of "minimum" salient features. One specification requirement was that the unit achieve a certain volumetric accuracy over its entire range, as measured in accordance with American National Standards Institute B89. Each bidder was to submit descriptive

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literature which was to be used in evaluating its bid's compliance with the specification requirements, including volumetric accuracy.

Apparently upon being advised of the award to Modern Machinery, on August 1 Sheffield wrote a letter to the contracting agency in which it "enter[ed] a protest" against the award on the basis that the Numerix brand machine bid by that firm did not meet the volumetric accuracy requirement. In its protest letter, Sheffield pointed out that the solicitation required the submission of descriptive literature; suggested that Modern Machinery's bid (which it apparently had not yet seen) would not contain literature establishing that the Numerix machine met the volumetric accuracy requirement; and argued that Modern Machinery's bid should have been rejected as nonresponsive if its descriptive literature failed to address this specification requirement.

The contracting officer responded to Sheffield's protest by letter of August 13, in which she stated the agency had "reevaluated" the award to Modern Machinery and must "still maintain our original position" in awarding the contract to that firm as the low, responsive bidder. The "quite detailed" descriptive literature submitted by that firm, she stated, was sufficient to meet the solicitation requirements and did indicate compliance with the volumetric accuracy requirement. "Unless we hear further from you," she concluded, "we will assume that [this] information will dissolve your protest."

Two days later, Sheffield replied to the contracting officer's letter, reiterating its position that the Numerix descriptive literature furnished with Modern Machinery's bid did not establish that the product offered met the volumetric accuracy requirement.

In a response dated August 27, the contracting officer advised Sheffield that "we have again reviewed" Modern Machinery's bid and concluded that its descriptive literature was "sufficient to establish that all elements of the specifications were met." In addition, the contracting officer stated:

"We also performed a technical evaluation of some of the other bids received, including yours, [during which] it was found that you had taken exception to [a specification requirement]. Had your bid been in line for consideration for award it would have been rejected because of this exception

"The status of the award to the low bidder . . .
has not changed. . . ."

On September 5, Sheffield filed with our Office its protest in which: (1) it reiterated its argument that Modern Machinery's bid was nonresponsive; (2) took issue with the contracting officer's assertion that the protester's bid also was nonresponsive; and (3) argued that the IFB was unduly restrictive of competition because it was "written around a competitor's machine."

We dismissed Sheffield's protest on the basis that it was untimely under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(3) (1986), which state that if a protest has been filed initially with the contracting agency, any subsequent protest to our Office must be filed within 10 working days "of formal notification of or actual or constructive knowledge of initial adverse action [provided the initial protest to the agency was filed timely]." (Emphasis added.) "Adverse agency action" is defined in our Regulations as including "a decision on the merits of a protest." 4 C.F.R. § 21.0(e).

By telegram received on September 16, Sheffield asks that we reopen the file on its protest and decide it on the merits because:

". . . All protests have been timely. Para. 33.103 FAR [Federal Acquisition Regulation] allows for protest with the agency involved."

"All responses to the agency and the GAO have been filed within the ten day period."

"Para. 33.102 B(1) FAR encourages contact with the agency before contacting GAO."

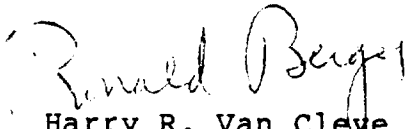
We have no reason to believe that Sheffield's initial protest of August 1 to the contracting agency was untimely. The contracting officer's response dated August 13, in which she stated that the contract award had been "reevaluated" and that the agency was maintaining its position that Modern Machinery properly received the award because its bid satisfied the IFB's descriptive literature requirement, clearly was a denial of Sheffield's protest and constituted the initial agency action adverse to Sheffield's protest. Since Sheffield received the contracting officer's denial of its agency-level protest by September 15 at the latest, any subsequent protest to our Office should have been filed with--i.e., received by--us no later than August 29. Sheffield's protest of the award to Modern Machinery, however, was not filed with us until September 5.

Section 21.2(a)(3) of our Regulations is clear that it is the knowledge of the initial adverse agency action on a protest that triggers the 10-day period for filing a subsequent protest to our Office. The purpose of that rule, like the purpose of our other timeliness rules, is to insure that protests are filed at a point in the procurement when corrective action, if warranted, is most practicable. See Comdisco, Inc.--Reconsideration, B-214409.3, Dec. 3, 1984, 84-2 C.P.D. ¶ 596. The fact that a firm continues to pursue a denied protest with the contracting agency, as Sheffield did here, does not warrant our consideration of a subsequently filed protest that does not comply with section 21.2(a)(3). See Bobnreen Consultants, Inc., B-218214.3, May 31, 1985, 85-1 C.P.D. ¶ 636.

Since Sheffield's protest to our Office concerning the award to Modern Machinery was not filed within the time limits prescribed by our Regulations, it is untimely.

Not until Sheffield's receipt of the contracting officer's letter of August 27 was it aware that the agency was of the opinion that Sheffield's bid was nonresponsive. Since we are not reviewing the propriety of the award to Modern Machinery, however, and Sheffield's bid is not presently under consideration for award, no useful purpose would be served by our considering the responsiveness of the protester's bid.

Finally, Sheffield asserts for the first time in its protest to our Office that the solicitation specifications were unduly restrictive because they were "written around a competitor's machine." We dismiss this basis for protest as untimely filed. Protests based upon alleged improprieties in an IFB must be filed prior to bid opening, 4 C.F.R. § 21.2 (a)(1).

for 
Harry R. Van Cleve
General Counsel